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No. 79-935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARVIN ALLEN, STEVEN JACOBSMEYER and
UNKNOWN POLICE OFFICERS,
Petitioners,

vs.

WILLIE MCCURRY,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

In their principal brief, Petitioners have demonstrated that the well-recognized defense of collateral estoppel can and must be available to defendants in actions under 42 U.S.C. §1983, consistent with the policy and purpose of that statute. Respondent and his amicus curiae, American Civil Liberties Union of Eastern Missouri (ACLU) have urged rejection of the defense, particularly where, as here, federal habeas corpus relief is unavailable to the §1983 plaintiff, a state prisoner alleging unlawful search and seizure. In view of the tenor of Respondent's argument, Petitioners feel compelled to reply to several points raised by Respondent.

At the outset, Petitioners observe that throughout his brief, Respondent has made a rather serious misstatement of the record - undoubtedly through oversight and not design. Neither the City of St. Louis nor the Board of Police Commissioners of the City of St. Louis (an independent state agency under Missouri law, Mo.Rev.Stat. §84.010 et seq. (1978)) is a party to this case. No summons was ever issued to or served upon either entity, nor are they named in the body of the Respondent's pro se complaint. The phrase "St. Louis Police Department, St. Louis, Missouri," appearing in the caption of the complaint, see Petition for Certiorari at A-21, was treated by the District Court and by Respondent himself[1] as descriptive only, referring to the "Unknown Police Officers."

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[1] Respondent himself has denied suing any governmental agencies. See Pet. Cert. A-30.

ARGUMENT

I. Respondent Has Misconceived The Proper Approach To Construction Of 42 U.S.C. §1983 With Regard To Available Defenses; Properly Construed, §1983 Admits Of A Collateral Estoppel Defense.

Respondent argues at length, and eloquently, concerning the need to provide special protection for federal constitutional rights, reiterating the familiar shibboleths concerning the seemingly endemic hostility of state officials, including judges, to those rights. Respondent overlooks both the peculiar circumstances surrounding the enactment of 42 U.S.C. §1983, as well as the long line of cases in this Court expressing confidence in the probity and integrity of state officers and agencies, even when federal constitutional questions are involved. Compare *Withrow* v. *Larkin,* 421 U.S. 35 (1975) with, e.g., *Angel* v. *Bullington,* 330 U.S. 183 (1946). Indeed, so polemical does Respondent's zeal become that he extends his accusations of indifference to the federal bench as well. Respondent's Brief, p. 27. If collateral estoppel is available as a defense under §1983, apparently the federal District Courts, as well as the state courts, will ignore their sworn duty.

In his impassioned plea for duplicative litigation, Respondent touches upon, but leaves undeveloped, the key to analysis of the questions presented in this case. Section 1983 "creates a species of tort liability that on its face admits of no immunities . . . ." *Imbler* v. *Pachtman,* 424 U.S. 409, 417 (1976). However, in *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951), this Court held that immunities "well-grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of §1983. "The decision in *Tenney* established that §1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman,* supra, 424 U.S. at 418. Thus, this Court has delineated a two-step analysis in determining availability of

defenses under §1983: (1) what was the common law when §1983 was enacted? and (2) is the policy of the common law in granting the defense consistent with the policy of §1983?[2] *Id.*, 421-25, esp. 424. See also *Owen* v. *City of Independence,* 100 S.Ct. 1398, 1409 (1980).

This analysis was followed in essence in *Owen* v. *City of Independence,* supra, and led to the rejection of a qualified immunity defense for municipalities sued under §1983. It is clear from *Owen* that a defense which was not clearly accepted and applied in common law tort actions will not be imported into the gloss on §1983. However, as demonstrated in Petitioners' principal brief, the defense of collateral estoppel survives the *Tenney-Imbler* analysis, being both well-grounded in history and reason, and consistent with the policy of §1983 to provide a supplementary federal remedy to protect federal rights when state remedies are adequate in theory but unavailable in practice. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961).[3] Thus, contrary to Respondent's contention, collateral estoppel can and must be applied in this case.

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[2] The approach of this Court is in this respect similar to a search for the "equity of the statute," bearing in mind, as it does, both the common law and the statutory objective. See S.E. Thorne, ed., Introduction, A Discourse upon the Exposicion and Understandinge of Statutes (1942) (for the enlightenment of Respondent's counsel, Samuel E. Thorne is Professor of Law Emeritus, lately Charles Stebbins Fairchild Professor of Law, Harvard University).

[3] Respondent's asseveration that the legislative history of §1983 is "unequivocal" as to the issues in the case at bar must be dismissed as hyperbolic advocacy. Compare *Monell* v. *Dept. of Social Services,* 436 U.S. 658 (1978) with *Monroe* v. *Pape,* supra. So far as the Congressional debates show, neither the defense of collateral estoppel nor the federal policy expressed currently by 28 U.S.C. §1738 can be deemed abrogated "by covert inclusion in the general language" of §1983. Moreover, the argument advanced by Respondent (Brief, p. 31), to the effect that collateral estoppel is no defense under §1983 because the statute extends to actions of the state courts, is directly

II. Respondent's Attempt To Reargue His Criminal Appeal In This Court Illustrates The Need For A Federal Rule Of Collateral Estoppel In §1983 Cases.

Petitioners decline to argue the merits of Respondent's criminal appeal, which has been decided adversely to him.[4] See Pet. Cert. A-13. Suffice it to say that, in an effort to bolster his case, Respondent attempts here precisely what a federal rule of collateral estoppel would foreclose: relitigation of state criminal cases in federal court through the medium of §1983. The dangers inherent in such duplicative litigation are obvious, and the benefits, if any, to be derived are ephemeral at best. Respondent's own arguments evidence the paradox: parallel §1983 actions will not interfere with or undermine state criminal judgments, but are needed to deter unconstitutional conduct by both police and state courts as well. See Respondent's Brief, p. 30; see also ACLU Brief, pp. 10-11. If a §1983 action will have no effect on state criminal proceedings, what deterrent effect will it have? Police officers will simply be confused by inconsistent adjudications; moreover, officers who are found to have acted illegally, but in good faith and with a reasonable belief in the lawfulness of their actions, will not be "deterred" at all, except insofar as protracted duplicative litigation deters one from doing his job as best he can.

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refuted by the legislative history. See the remarks of Senator Edmunds, quoted in Petitioners' principal brief at 21-22. Congress' refusal to give federal courts exclusive jurisdiction in §1983 cases, see *Martinez* v. *California,* 100 S.Ct. 553, 558 n. 7 (1980), also militates against Respondent's claims.

[4] Petitioners would note that, contrary to Respondent's assertions, the Missouri Court of Appeals did not misapply *Mincey* v. *Arizona,* 437 U.S. 385 (1978). The original entry of the police officers into Respondent's home was clearly proper, and the fact that evidence seen in plain view at the time was apparently seized a short time later by another officer does not invalidate the lawful entry or seizure of evidence in plain view. See *Michigan* v. *Tyler,* 436 U.S. 499, 509-10 (1978); *United States* v. *Oaxaca,* 569 F.2d 518 (9th Cir.), cert. denied, 439 U.S. 926 (1978).

Respondent and ACLU both contend that the dangers of a flood of duplicative litigation are slight, but the realities of prisoner-initiated federal litigation make their contentions seem meretricious indeed. A superficial examination of S.W.2d advance sheets from April to August, 1980, reveals more than a score of state criminal cases involving search and seizure issues. The potential for an increase in §1983 litigation exists, and it is fatuous to deny it. This potential should not be ignored. Indeed, even Respondent and his amicus argue that collateral estoppel can prevail if federal habeas corpus relief is available. E.g., Respondent's Brief, p. 18. This approach is "logically sound", but "perhaps" at variance with the legislative history. *Id.* Surely Respondent cannot have it both ways. Either collateral estoppel was abrogated by §1983 or it was not. To apply collateral estoppel only when habeas corpus is available is merely another form of abstention, abstention until a federal court acts.[5]

Clearly, Respondent confuses remedies with results. Respondent received a full and fair hearing on his Fourth Amendment claim in the state courts. The opinion of the Missouri Court of Appeals, Pet. Cert. A-13, reflects not hostility toward federal constitutional rights, but rather a conscientious effort by state judges to apply controlling federal law. Such an effort was exactly what the 42d Congress expected from the state courts;

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[5] In this connection, Petitioners observe that the Court of Appeals' invocation of the abstention doctrine in this case, see Pet. Cert. A-11 -A-12, is ill-advised. What is accomplished by delaying a §1983 damage action pending outcome of a state criminal appeal? If the state judgment has no collateral consequences, who benefits from such delay? Abstention is properly invoked only when equitable relief is sought which would have a direct impact on the state proceeding, and the state proceeding could itself eliminate the need for such relief. E.g., *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). Thus, contrary to Respondent's assertion, Brief, p. 34, abstention in cases such as this does not serve federal-state comity or the orderly administration of justice.

§1983 was enacted to provide for the case in which no such effort was or would be made, even though the state remedy appeared to be adequate. The federal rule of collateral estoppel sought by Petitioners would ensure that the intent of the 42d Congress as well as of the Framers of our federal system will be carried out.

III. Respondent's Attempt To Amend His Complaint In This Court Demonstrates That The District Court Properly Granted Partial Summary Judgment On The Basis Of Collateral Estoppel.

Respondent, apparently overlooking the actual posture of this case, devotes considerable attention to a liberal construction of his pro se pleadings. However, Petitioners must point out that the issue of collateral estoppel was raised by motion for partial summary judgment, Pet. Cert. A-25, which was granted by the District Court, *id.*, A-3. Accordingly, Rule 56, F.R.Civ.P., and not Rule 12(b)(6), is controlling. See generally 10 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §2735, pp. 653-68 (1973). Petitioners do not now and never have contested the Court of Appeals' reinstatement of Respondent's assault claim. Pet. Cert. 4 n. 1.

Of course, Respondent is correct in arguing that his pro se complaint is entitled to liberal construction, *Estelle* v. *Gamble*, 429 U.S. 97 (1976), and that he could be entitled to nominal damages on account of the seizure of illegal drugs from the drawers and stack of tires in his home. *Carey* v. *Piphus*, 435 U.S. 247 (1978). Nevertheless, Petitioners' (and the District Court's) construction of Respondent's pleadings (including cross-motion for summary judgment) cannot be characterized as inane. Respondent may or may not have enough common sense to know that even an illegal seizure of contraband would not warrant damages of $1,000,000 - the amount claimed in the complaint. Pet. Cert. A-24. His pleadings, however, reveal that his claim relates not to the scope of the search, but to the va-

lidity of the entry into his home without a warrant. See Pet. Cert. A-31. Respondent should not now be heard in his attempt to parse his claims and amend his complaint on appeal. This belated shifting of ground merely reflects the correctness of the construction of his pleadings below.[6]

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners' principal brief, the judgment of the Court of Appeals must be reversed and the case remanded either for reinstatement of the District Court's order granting partial summary judgment or for reconsideration.

Respectfully submitted,

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[6] Even if Respondent's complaint is construed to allege multiple claims of illegal search and seizure, the judgment of the Court of Appeals must nonetheless be reversed (or vacated) for failure to apply appropriate federal rules of collateral estoppel, which would in any case bar at least of Respondent's Fourth Amendment claims.